No 259.

1768. *February* 23. ——— *against* REID of Logie.

REID of Logie claimed to be enrolled a freeholder of Forfar at Michaelmas 1767, and produced as his titles; 1*mo*, Charter of the lands claimed on in favour of Alexander Stormonth; 2*do*, Disposition from Thomas Stormonth, the son of Alexander, in favour of the claimant, containing an assignment to the unexecuted precept of the charter; and, 3*tio*, His own instrument of sasine in virtue of that precept. But, when the claim was moved, Thomas Stormonth's general service to his father, a necessary link to connect Thomas with the precept, and to enable him to convey it, was not to be found. The freeholders, however, overruled the objection. The Court of Session altered this judgment. But the House of Lords, on appeal, in respect that the retour of Thomas's service was in the hands of the clerk to the meeting of freeholders, on the morning of the day of their meeting, and was then lost by accident, so that an extract could not be got thereof during the sitting of the meeting, but which extract was produced to the Court of Session, ordered the interlocutor to be reversed.——*See* APPENDIX.

Fol. Dic. v. 3. *p.* 436.

1773. *March* 11.

ALEXANDER GORDON of Whitley, *against* General JAMES ABERCROMBY, and Others.

No 260.

It is competent in the Court of Session to receive evidence explanatory of a claimant's title, to remove an objection sustained in the Court of Freeholders.

MR GORDON claimed to be enrolled as a freeholder in the county of Banff, upon certain lands, and among others, 'the lands of Inveraurie, and the lands 'of Inverhebit, formerly called Middle, or Little Inverhebit, and now called 'Beilcherach of Inverhebit.' To prove the valued rent of these particular lands, he referred to an article in the valuation-roll, made up in 1690, stated thus: 'Inveraurie and Inverhebit, L. 250.' To this claim it was *objected, inter alia*, that there were three different farms of the name of Inverhebit, viz. Easter, Wester, and Middle, or Little Inverhebit; and that no evidence was produced to show, that the valuation stated in roll 1690. to Inveraurie and Inverhebit, applied only to Little Inverhebit. The freeholders sustained the objection, and refused to enrol.

Mr Gordon complained of this judgment, and offered to prove, that the lands of Little Inverhebit, now called Beilcherach, were the lands which, together with Inveraurie, had uniformly paid cess for the article of L. 250 in the valuation-books. And of those points the Court allowed a proof.

Pleaded by the respondents to the complaint, in a reclaiming petition; It is a clear point, that this Court have no original jurisdiction for enrolling freeholders. They have only a power, by statute, to review the proceedings of the free-

holders, in the form of complaint. A person, therefore, who is desirous to be enrolled as a freeholder in any county, must go to the Court of Freeholders with his titles, and whole instructions of his qualification. He must give the freeholders an opportunity of seeing and examining the evidence upon which he claims to be admitted; and it is totally incompetent for him to apply to this Court, in the first instance, or to make his productions, for the first time, here, in order to entitle him to be enrolled. If the freeholders have erred, or misapprehended the import of the evidence before them, they are, no doubt, subject to the correction of the Court of Session; but if, on the other hand, they have pronounced their judgment agreeable to the evidence before them, it would have an extraordinary appearance, to find, that they have done wrong, when the Court of Session, judging upon the same evidence, must have pronounced the same judgment. No 260.

That the freeholders, in this case, determined properly upon the evidence before them, the complainer himself admits; because he acknowledges, that farther evidence than what was produced to the freeholders, is necessary, in order to support the plea he now maintains. And, if the complainer has any sufficient evidence to produce for removing the objection stated to the freeholders, he may claim of new at next Michaelmas, and produce that evidence to the freeholders; who, on the objection being removed, will admit the complainer to the roll. But it is altogether incompetent to produce that evidence in this Court which has never been laid before the freeholders.

The complainer was obliged to admit, as to the titles and valuation or retour, that these could not be produced before this Court in the first instance; because so it was expressly found by the House of Lords, in the case of Gordon No 257. p. 8874. The question there was about the production of a retour, which Sir John Gordon did not think proper to show to the freeholders; and although this was not strictly speaking, a part of the title, but an evidence for proving that his lands were retoured at 40 shillings of old extent, the House of Lords held the production of this to be equally essential with that of his title deeds, and in effect to constitute a part of his title or qualification; and expressly found, that this Court, having no original jurisdiction to enrol, could not receive such evidence here in the first instance.

It is plain that, in reason, there can be no difference between omitting altogether to produce the titles before the freeholders, and producing such as are insufficient for the purpose. For example, suppose a claimant shows, from his title-deeds, that he has a right to the lands of A, and produces a retour, bearing, that the lands of B. are forty shillings of old extent, and, at the same time, avers, before the freeholders, that the lands of A, and the lands of B, are the same, but without showing any evidence of such averment; what can the freeholders do in such a case but reject the claimant? This does not hinder him to come another time, with the necessary instructions for supporting his qualification, by connecting his titles with his retour, and showing that A. and B. are

No 260. the same lands; but he cannot go before the Court of Session, as a court of enrolment, in the first instance, and there make his productions, in order that that court may enrol him, and overturn the judgment of the freeholders, upon evidence which never was before them.

The same thing is to be said, where there is a want of connection between the titles and the valuation, or where there is any other defect in the instructions of the claim, requiring to be supplied by other writings, or by the production of further evidence. And this doctrine is not only founded in reason, and in the nature of the jurisdiction which this Court has, with respect to enrolment, but has also been established by repeated decisions, in similar cases, particularly in the case of Captain Stewart, a claimant in Forfarshire, No 258. p. 8874.

In fine, the alleged defect in the law is altogether imaginary; though, were there any as to this particular, it would not follow that this Court could amend or alter the same, and convert its jurisdiction, which is founded in statute, and goes no further than a power of review, into an original jurisdiction. Every claimant is supposed to know the defects of his own titles, and ought therefore to be furnished with the proper evidence for supplying the same, when objected to. This was the principle adopted in the case of Captain Stewart; and it was then observed, that, if a claimant was not possessed of the necessary documents for supporting his qualification, it was his duty to take the proper steps to furnish himself with such evidence.

Answered; It is admitted, that, as the Court of Session have no radical jurisdiction, as a Court of Freeholders, the claimant's titles cannot be produced, in the first instance, before this Court. The titles being essentially necessary to found the party in his claim, (and, without which, no enrolment can proceed), must undoubtedly be laid before that meeting, who must necessarily judge, in the first instance, of the qualification. But, when the titles requisite for founding the claim are actually produced before the meeting of freeholders, there is nothing, in law, or reason, or the practice of the Court, to deny the claimant the liberty of laying before them any extrinsic evidence that he can adduce, for obviating any doubt or difficulty that may be stirred, respecting the identity of the lands, or other objections of that nature.

Indeed, without establishing such distinction, the purposes of justice, in many cases, could not be attained. If supplementary evidence could not be admitted here, it would be scarcely possible for a claimant ever to get on the roll, where he happened to be disagreeable to the majority of the meeting, as nothing more would be necessary than to state objections, however false or ill grounded, to point out other lands of the same name, and to make averments contrary to truth. As the law does not require any previous intimation of the objections, it is impossible that the claimant can come to the meeting with evidence prepared for removing all the pretended doubts and difficulties which may be suggested, and which he could know nothing of till they were stated; and, according to this doctrine, let his qualification be ever so good, and the averments

against him ever so false, he must remain forever off the roll, because it is in vain for him to complain to the Court of Session. No 260.

The respondents take too slight a view of the case, when they argue, that, if farther evidence be necessary for supporting the claim, and removing the objections stated against it, the claimant must apply to the next Michaelmas meeting, and there produce his new evidence. This might possibly answer, (although it must necessarily occasion a twelve months delay), where the claimant himself is possessed of the evidence; but, as freeholders have no compulsatory jurisdiction, matters would be inextricable, where the facts to be proved rested either upon parole evidence, or upon the evidence of writings, the property of third parties, and in their custody.

As to the case of Captain Stewart, it is but a single decision; and there was one material difference between that case and the present. It was plain, from the showing of the claimant himself, that it was his own fault that sufficient evidence, for establishing the identity of the lands, was not laid before the freeholders; for, in his application to this Court, he sets forth, 'That he had now 'recovered and produced a complete progress of the lands, from the 1631, 'downwards, which might have been seen on record, whereby it was proved, 'beyond the possibility of a cavil, that the lands were the same.' And, in the answer to the complaint, the fact was not disputed. But the case is very different, where the claimant not only was not possessed of the evidence, but, without the interposition of this Court, never can be possessed of it; and, of consequence, though possessed of a substantial qualification, can never have it in his power to be put on the roll, were the present application incompetent and inadmissible.

"THE LORDS adhered." And thereafter, on advising the proof adduced by the complainer, found the points proved; and therefore repelled the objection to the complainer's titles; and, on the whole, found that the freeholders did wrong in refusing to enrol the complainer, and granted warrant to add his name to the roll.

Act. *Advocatus, Sol. General, Cosmo Gordon, R. Blair.* Alt. *Ilay Campbell, Elphinstone, Abercrombie.* Clerk, *Pringle.*

Fol. Dic. v. 3. *p.* 435. *Fac. Col. No* 68. *p.* 166.

*** In this case, and in others of a similar nature, from the counties of Elgin, Renfrew, and Kinross, the Court made the following distinction:— Every person must produce his charter and sasine, and likewise a retour, when he claims upon the old extent, or a certificate of his valuation, if he claim upon valued rent. These are radical titles, without which he cannot be enrolled; but if they be produced, and appear *ex facie* to be good, objections made to them upon grounds not foreseen, may be removed by new collateral or explanatory evidence before the Court of Session.——*See* APPENDIX.